Supreme Court, U.S.
FILED
NOV 12 2010
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No. 10-220

In the Supreme Court of the United States

SEAN STEPHEN AND DARYL STEPHEN,
Petitioners,

v.

POLICE OFFICER JOHN HANLEY,
SHIELD NO. 13199, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY

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ARGUMENT

Defendants rely heavily on the notion that they did not learn of the failure-to-intervene theory until the "eve of trial." Opp. 7. That assumes exactly the issue raised in the Petition—whether a pleading of excessive force, which defendants received long before the trial, necessarily encompasses, and thereby gives notice of, a claim for failure to intervene.

Nor is plaintiffs' characterization even factually accurate. Despite their carefully-worded assertion that the issue "was not brought to the District Court's attention until . . . days before the trial" (Opp. 7), they do not dispute, that ***they*** had notice "some eight weeks before trial" (App., 4a). Discovery also gave defendants ample notice that the plaintiffs intended to pursue the theory. In his deposition, Sean Stephen explained that he was suing Sergeant White because he "was in the household. White was there while they was beating me and ***he didn't do anything to stop them from doing anything***." Second Circuit App. at 326 (emphasis added). The Fourth Amended Complaint likewise alleged that Sergeant White was liable for supervising other defendants. App., 32a (alleging that other defendants "were acting under the command of defendant WHITE").

It is also telling that, in all their protests about unfair surprise, defendants never identify anything that they would have done differently had they had notice of the failure-to-intervene claim—not even a single deposition question. That is no accident. It is hard to imagine discovery on an claim for use of excessive force that fails to address the only two issues relevant to failure to intervene, namely, whether any

officers did intervene and, if not, whether they had the opportunity to do so. And, as explained in the Petition (at 9–10) any prejudice is particularly small given the testimony in this case.

Defendants also rely on the Second Circuit's assertion that the denial of the instruction was within the District Court's "discretion." That misstates the standard of review. In the Second Circuit:

> A litigant is entitled to an instruction on a claim where that claim is supported by evidence of probative value. All that a party needs to show is that there is some evidence supporting the theory behind the instruction so that a question of fact may be presented to the jury. The failure to give an instruction under such circumstances is error that warrants a new trial if that error is prejudicial.

Anderson v. *Branen*, 17 F.3d 552, 557 (2d Cir. 1994). The District Court rejected the proffered instruction because it decided that excessive force and failure to intervene are distinct claims. That, we submit, was a decision of law.

Defendants attempt to distinguish *Miller* v. *Smith*, 220 F.3d 491 (7th Cir. 2000) and *Richman* v. *Sheahan*, 512 F.3d 876 (7th Cir. 2008) only on the evidence. Opp. 14–15. They ignore the relevant point, which is that *Miller* allowed a failure-to-intervene theory to proceed even though it was not distinctly pleaded. (Plaintiffs rely on *Richman* only for the proposition that failure to intervene is a subset of excessive force. See Pet. 8.) Significantly, in denying the instruction, the District Court here did not find that there was not "some evidence [that]

support[ed] the theory"; it relied solely on the absence of an express pleading.

As to *Miller*, defendants argue only that "some of the named respondent officers arrived on the scene after petitioners" were "secured." Opp. at 14. Even assuming that the jury would have accepted that version of the facts, defendants do not even argue that it would have applied to the other officers, who admitted being in the apartment while the beatings occurred. Likewise, the fact that, here, "the Complaint ascribed specific usages of excessive force to individual officers" (*id.* at 8) hardly put the defendants less on notice of failure-to-intervene liability than they were in *Miller*. Nor are allegations that each officer actually used force "inconsistent" (*ibid.*) with the theory that those same officers were present and failed to stop the use of force by others.

Defendants distinguish *Hale* v. *Townley*, 45 F.3d 914 (5th Cir. 1995), on the ground that the *Hale* plaintiff alleged that some defendants "stood by and laughed" (*id.* at 917), while the Petitioners did not plead "specifics" about what the non-intervening officers did. Opp. 16. Not only does *Hale* not specify whether those allegations were in the complaint or merely in the factual record, plaintiffs never explain why they are relevant—section 1983 does not impose heightened pleading standards. In this case, plaintiffs alleged that they were beaten in the dark, and it should be no surprise that they did not notice whether the other officers were laughing.

Finally, defendants' treatment of *Campbell* v. *Lynch*, 264 F. App'x 836 (11th Cir. 2008) is irrelevant. They argue that the plaintiff in *Campbell* had challenged the legality of the officers' entry, while the plaintiffs here did not. Opp. 16. But the legality

of the arrest neither permits the officers to use excessive force themselves nor obviates their duty to prevent the use of force by others. Here, as stated above, the jury could have inferred that no one in the small apartment could have been unaware of the beatings going on in the bedroom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2010